Nos. 82-1248, 82-1278

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Supreme Court of the United States

OCTOBER TERM, 1982

ELLEN SCHALL, as Commissioner of the New York City Department of Juvenile Justice,

Appellant,

and

ROBERT ABRAMS, as Attorney General of the State of New York,

Intervenor-Appellant,

—v.—

GREGORY MARTIN, LUIS ROSARIO, KENNETH MORGAN, and all others similarly stated.

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR APPELLEES

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ELLEN SCHALL, as Commissioner of the New York City Department of Juvenile Justice,

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v.

GREGORY MARTIN, LUIS ROSARIO, KENNETH MORGAN, and all others similarly stated.

Appellees.

On Appeal from the United States Court of Appeals for the Second Circuit

BRIEF FOR APPELLEES

STATEMENT OF THE CASE

This is a class action writ of

habeas corpus, pursuant to 28 U.S.C. § 2241 et seq., which challenges as unconstitutional the provision of the New York Family Court Act authorizing pretrial detention of alleged juvenile delinquents whenever "there is a serious risk that [the juveniles] may before the return date commit an act which if committed by an adult would constitute a crime." Family Court Act (hereinafter "F.C.A.") § 320.5(3)(b)[formerly § 739 (a)(ii)].

After a full trial on the merits, the United States District Court, Southern District of New York, declared the statute unconstitutional. United States ex rel. Martin v. Strasburg, 513 F.Supp. 691 (S.D.N.Y. 1981)(J.A. 36-92).[1] The

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[1]Citations to pages in the Joint Appendix filed on this appeal are indicated by "J.A. __". Citations to portions of the trial transcript included in the record before this Court, but not in the Joint Appendix, are indicated by "T.

District Court findings and conclusions were unanimously affirmed by the Second Circuit. Martin v. Strasburg, 689 F.2d 365 (2d Cir. 1982)(J.A. 95-123). Thus, the case is before the Court on affirmed findings of fact, with no factual issues presented to the Court for review.[2]

A. Proceedings in the Courts Below

A petition for a class action writ of habeas corpus and declaratory judgment was filed in the United States District Court, Southern District of New York, on December 21, 1977, and refiled in amended form with additional named

(footnote continued)

__". Exhibits presented by appellees and intervenor-appellant, listed at J.A. 332-341 and contained in Document 26 of the record on appeal, are cited by petitioners' exhibit number ("PX __") and intervenor-appellant's exhibit number ("SX ___"), respectively.

[2]Petitioners-appellees (hereinafter "appellees") adopt the summary of juvenile delinquency procedures under Article III of the New York Family Court Act as set forth in the Brief of Appellant Schall, at 9-16, except as noted herein.

petitioners on March 31, 1978. (J.A. 1, 8-15). On April 3, 1978, the district court certified the proceeding as a class action, defining the class as:

> all juveniles who are now being held or will be held before these proceedings are concluded, in pretrial detention under § 739(a)(ii) [now § 320.5(3)(b)] of the [Family Court] Act.

(J.A. 32). The court further held that appellees had sufficiently exhausted state remedies, as required by 28 U.S.C. § 2254(b), in that in 1976 the New York Court of Appeals had upheld the constitutionality of the pretrial detention statute against a challenge identical to that presented in the instant case. People ex rel. Wayburn v. Schupf, 39 N.Y.2d 682, 385 N.Y.S.2d 518 (1976)(J.A. 29).[3]

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[3]Appeal to this Court from Wayburn was unavailable because the case was moot. See Murphy v. Hunt, 455 U.S. 478 (1982)(per curiam). Because the detainee in Wayburn was past the age of 16

A bench trial was held at which appellees presented testimony of an attorney experienced in juvenile delinquency cases (Steven Hiltz),[4] a supervising probation officer in the Bronx County Family Court (Hubert Benjamin)[5] and experts in criminological statistics

(footnote continued)

by the time of the decision, the issue was not capable of repetiton as to him. Weinstein v. Bradford, 423 U.S. 147 (1975). Indeed, the issue was moot, for Article III purposes, by the time the New York Court of Appeals decided Wayburn. That court reached the merits purely as a matter of discretion because of the importance of the issue without implicating a view of Article III. See DeFunis v. Odegaard, 416 U.S. 312,316(1974)(per curiam).

[4]Steven Hiltz was an attorney in the Juvenile Rights Division of The Legal Aid Society for 8 1/2 years and was the attorney-in-charge of its Manhattan office from 1976-1979. (J.A. 127-128).

[5]Hubert Benjamin has been a supervising probation officer in the Bronx Family Court since 1968. He had been a probation officer for thirty years at the time of trial. (J.A. 141).

(Leslie T. Wilkins)[6] and child psychiatrist (L. David Zinn).[7] Additionally, appellees presented testimony of three juveniles and an illustrative sampling of family court histories of juveniles detained pursuant to former F.C.A. § 739(a)(ii),

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[6]Leslie Wilkins, professor of Criminal Justice at the State University of New York at Albany since 1969, was a former dean of the School of Criminology of the University of California at Berkeley. As a statistician certified by the Royal Statistical Society in Great Britain, he has received honors, has held editorial positions on professional journals, has done consulting for, inter alia, the United States Department of Justice and has published numerous books addressing issues of criminology, detention and sentencing. See, e.g., Wilkins, Evaluation of Penal Measures (1969). (J.A. 184-188; PX 40).

[7]Dr. Zinn, who is Board-certified in general and child psychiatry, is the Director of Child Psychiatry at Michael Reese Hospital in Chicago and Clinical Assistant Professor at the University of Chicago. In addition to numerous publications and professional affiliations, Dr. Zinn served as a consultant, inter alia, to the Washtenaw County (Michigan) Juvenile Court, the New York State Council on Children and Families and the Juvenile Justice Institute. (J.A. 227-230; PX 41).

thirty-four of which were relied upon by the district court, as well as relevant reports and statistical compilations. See J.A. 332-338; PX 1-44.

Intervenor-appellant offered the testimony of Ralph Kelly, then Deputy Commissioner of the New York City Department of Juvenile Justice ("D.J.J."), Michael Bigley, then director of the Detention Services Section of the New York State Division for Youth ("D.F.Y."), Hon. Cesar Quinones, a judge of the New York State Family Court, and Hon. Margaret Driscoll, a judge of the Connecticut Superior Court. Intervenor-appellant also put into evidence various documents concerning detention procedures in New York and Connecticut, as well as additional statistics. See J.A. 339-341; SX A-T. The Commissioner of the Department of Juvenile Justice participated neither in the trial nor

the appeal of the case to the United States Court of Appeals, Second Circuit.

On April 17, 1981, the district court issued its opinion declaring New York's juvenile preventive detention scheme unconstitutional as a violation of the Fourteenth Amendment. The court held the statute violative of due process because:

> (1) it gives the judge a license to act arbitrarily and capriciously in a [F.C.A.] § 739 [(a)(ii)] prediction of the likelihood of future criminal conduct which cannot result from a reasoned determination, (2) pretrial detention without a prior adjudication of probable cause is, itself, a per se violation of due process, and (3) in addition, constitutes punishment that is constitutionally impermissible under the due process clause.

(J.A. 69).

The court entered judgment in an order on June 1, 1981, which declared F.C.A. § 739(a)(ii) unconstitutional and directed release forthwith of all

class members in custody pursuant to that statute. (J.A. 93).[8] An application made by intervenor-appellant for a stay of the court's June 1, 1981 order pending appeal was denied by the Second Circuit, on September 22, 1981. (J.A. 6).

On appeal, the Second Circuit unanimously affirmed the findings of the district court. Judge Winter, in a careful opinion "strictly limited to the precise issue" before the court, held

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[8]In a clarifying memorandum to all counsel, dated August 5, 1981, the court stated that the writ required release of all juveniles held by appellant "under the relevant act until this proceeding is concluded or the judgment entered is reversed." (J.A. 94). Intervenor-appellant continues to challenge the propriety of the court's release order, which was affirmed by the Court of Appeals (J.A. 115-116), notwithstanding the clear holdings of this Court in Preiser v. Rodriguez, 411 U.S. 475, 487 (1973), Braden v. Judicial Circuit Court of Kentucky, 410 U.S. 484, 489 (1973) and Peyton v. Rowe, 391 U.S. 54 (1968). However, this issue is not properly before the Court on this appeal. 28 U.S.C. § 1254(2).

> only that pre-trial detention may not be imposed for anti-crime purposes pursuant to a substantively and procedurally unlimited statutory authority when, in all likelihood, most detainees will either not be adjudicated guilty or will not be sentenced to confinement after an adjudication of guilt.

(J.A. 114). The panel expressly "intimate[d] no view as to the constitutionality of preventive detention in other circumstances." Id.

The panel found, based on undisputed evidence, that

> the vast majority of juveniles considered sufficiently dangerous by the Family Court to justify pre-trial incarceration...are in fact released by prosecutors or by the Family Court within days or weeks.

(J.A. 103-104). The majority concluded that, since the "unconstitutional impact of the statute results directly from its substantively and procedurally unlimited terms" and since individual litigation by individuals adversely affected is a "practical impossibility," the statute

is "invalid as to all juveniles." (J.A. 113-114).

In a concurring opinion, Judge Newman re-emphasized the narrowness of the court's holding:

> It is not necessary in this case to assess the ultimate issue whether the Constitution prohibits pretrial detention on the basis of uncertain predictions of future criminal behavior. [Citation omitted]. The far narrower issue here is whether the risk of an erroneous prediction about future crime is high and whether safeguards not included in section 739(a)(ii) would be of value.

(J.A. 120). Rather than relying upon the majority's conclusions regarding the actual numbers of juveniles either mistakenly or punitively detained, the concurrence held the statute violative of due process:

> not because it has been shown to yield an unacceptable number of mistaken or impermissible results, but simply because it needlessly creates an unacceptable risk of such results.

(J.A. 117-18).

Declaring that the statute:

> permits liberty to be denied, prior to adjudication of guilt, in the exercise of unfettered discretion as to an issue of considerable uncertainty - the likelihood of future criminal behavior

(J.A. 117), Judge Newman identified five particular deficencies in the statutory scheme which, if rectified, would reduce the risk of error and comport with due process:

> First, the statute places no limits on the crimes for which the person subject to detention has been arrested. ... Second, the judge ordering detention is not required to make any evaluation of the degree of likelihood that the person committed the crime of which he is accused. ... Third, the judge is not required to assess the individual's background. ... Fourth, the statute places no limits on the type of crimes that the judge believes the detained juvenile might commit if released. ... Fifth, the statute does not specify any standard of proof by which the judge must be persuaded of a serious risk of future crime.

(J.A. 121-122).

B. Juvenile Delinquency Proceedings in New York State

Since 1978, New York State has had a dual system for prosecuting juveniles accused of committing acts which would be crimes if committed by adults. Children over thirteen years of age charged with homicide and children over fourteen years of age charged with kidnapping, arson, rape and other serious felonies are subject to prosecution as "juvenile offenders" in the adult criminal courts. New York Penal Law §10.00(18).[9]

Juveniles charged with less serious crimes, as well as those who are too young to be subject to juvenile offender prosecution or whose cases have been "removed" from the criminal courts,[10]

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[9]Ironically, these more serious offenders, like adult criminal defendants in New York, may not be preventively detained.

[10]See New York Criminal Procedure Law §§ 180.75, 190.71, 210.43 and 725.

are subject to prosecution as juvenile delinquents in the Family Court. All alleged juvenile delinquents are subject to the preventive detention provision, F.C.A. § 320.5(3)(b), at issue on this appeal.

On July 1, 1983, a new juvenile delinquency procedural code was implemented in New York State (F.C.A., Art. III; Laws of 1982, chs. 920, 926). Most of the substantive law of the former delinquency statute has remained intact, including former § 739(a)(ii), at issue in the courts below, which has been recodified verbatim in the new act. See F.C.A. § 320.5 (3)(b).[11]

Upon being brought to Family Court for processing, most accused delinquents are interviewed by the local probation

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[11] Appellees fully concur with appellant's position that passage of the new code, with former F.C.A. § 739(a)(ii) simply recodified as § 320.5(3)(b), in no way moots this appeal. Appellant's Brief at 22-23.

service ("probation intake") for possible informal resolution of their cases prior to filing a petition ("adjustment"). F.C.A. § 308.1; J.A. 53-54, 129,136,141-143.

Probation's inquiry lasts from ten to forty or forty-five minutes. The parent, guardian, complainant or arresting officer may or may not be present. The juvenile is not entitled to counsel. The purposes of the interview are twofold -- to determine the possibility for adjustment, as well as to gather information upon which to base a detention/release ("parole/remand") recommendation to the family court, should the case go before the court. There is no "professional psychiatric or psychological examination"[12] and the interview may or

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[12]Such examinations may occur at a later stage, to aid the court in determining mental capacity to stand trial or an appropriate disposition.

interview may or may not be conducted by a probation officer with a professional degree.[13] (J.A. 54-56, 147-148,152-153).

The recommendation to release or detain is based on whether the probation officer "feels that the child may be a calculated risk if returned to the community." (J.A. 143)[14]

After a petition is filed, the accused juvenile makes his "initial appearance" (arraignment) in the family court intake part. F.C.A. § 320.1 et

(footnote continued)

F.C.A. §§ 322.1,351.1. However, there is no procedure for pre-petition evaluations to assist probation in making recommendations. (J.A. 152).

[13]Although probation intake officers are required to have masters degrees in social work, sociology or related fields, or bachelors degrees in these fields plus two years paid related work experience, many simply possess the latter. (J.A. 54, 147-48).

[14]Mr. Benjamin, who has performed thousands of such interviews stated that this feeling is based, in part, on the "attitudes" of the parties present. (J.A. 144).

seq. It is at this appearance that the court makes the determination to detain or release. The appearance is quite perfunctory, lasting only five to fifteen minutes. As the Court of Appeals found, at the initial appearance Family Court judges simply have before them a petition and affidavit, if any,[15] a recommendation by son officer") who had not personally conducted the interview(s), and statements, if any, by the child, his attorney and accompanying parent or other adult. (J.A. 104,106,251-259). As noted by the district court, "often a probation representative ("court liai-

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[15]Contrary to appellants' implication, a family court petition is no more a "probable cause" petition than is a criminal court accusatory instrument. It simply represents a prosecutor's decision to prosecute, untested by judicial review. See Gerstein v. Pugh, 420 U.S. 103,118 (1975). The sufficiency of the petition is not tested at the initial appearance, but may be tested at the probable cause hearing or by written motion within 30 days of the appearance. F.C.A. §§ 315.1(3); 332.2.

there is no one present with personal knowledge of what happened." (J.A. 57). While brief inquiries may be made of the parent or other adult who may be present with the child,

> no inquiry is made into the non-hearsay allegations of the truth of the charges, and no testimony in taken under oath.

(J.A. 56-57,72).[16] Although present, counsel typically is assigned to the child just as the hearing begins. Thus,

> he takes on responsibility for the proceedings only moments before convincing reasons must be presented to the court for not ordering pretrial detention.

(J.A. 72).

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[16]Judge Quinones, in fact, flatly denied that complainants present oral evidence at detention hearings in lieu of affidavits attached to petitions drawn on information and belief:

> I don't see how that would happen, because if you had their presence, you would have the person sign the petition itself. I don't see how that would happen. (J.A. 252).

On the basis of the limited information presented during the brief detention hearing, the Family Court judge orders detention or release based on an assessment of the likelihood of crime commission during the period of time between the initial appearance and the "return date", or next immediate adjourned date, generally a period of "several weeks." (J.A. 263).[17] The only statutory guidance for making this determination is F.C.A. §320.5(3), which provides:

> The court shall not direct detention unless it finds and states the facts and reasons for

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[17]Thus, contrary to intervenor-appellant's assertion, the judge's assessment at the detention hearing covers a far shorter time span than the 120 days generally permitted for trial under F.C.A. § 340.1(3). Likewise, it is a far shorter time span than the period which Professor Wilkins testified is the peak period for recidivism of convicted individuals following release from incarceration. Professor Wilkins established that period as "between about 3 months to 6 or 9 months" after release. (J.A. 201).

> so finding that unless the respondent [juvenile] is detained:
>
> (a) there is a substantial probability that he will not appear in court on the return date; or
>
> (b) there is a serious risk that he may before the return date commit an act which if committed by an adult would constitute a crime.[18]

As found by the Court of Appeals, in making detention determinations under the latter standard, Family Court judges generally "emphasize matters going solely to the protection of the community" -- e.g. "prior record, recent court contacts, seriousness of the charge, and adequacy of supervision" --but not "interests of the child," a consideration relevant only at disposition. (J.A. 104-10; see also J.A. 263-267). While these general considerations prevail, any juvenile with any background may be

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[18]While §320.5(3)(b) is challenged as unconstitutional, §320.5(3)(a) is not at issue in this proceeding.

detained. There are no limitations in the scheme; "[e]ach judge follows his own individual approach to this determination." (J.A. 57).[19]

Additionally, external influences have been recognized as having an effect on judicial decision-making about detention. Steven Hiltz stated that the detention rate "varied dramatically given the political climate." (T. 60). Professor Wilkins recognized the "risk aversive" tendency of decision-makers who must enforce this kind of scheme

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[19]While common factors are considered, neither Judge Quinones nor Judge Driscoll, the two judges testifying on behalf of intervenor-appellant, testified that the various criteria that they use in rendering detention determinations are identical to those utilized by other judges in their jurisdictions. Both limited their testimony to the factors they themselves consider. (J.A. 263,269,272,319-322,327-328). According to Judge Quinones: "I guess we all have our standards and we all have measures of determining in our minds the seriousness of the allegations." (J.A. 265).

(J.A. 203).[20] Intervenor-appellant's expert, Michael Bigley, testified, in the same vein, that recent shifts in "conservative attitude" may have altered the judges' thinking about the detention concept (J.A. 178).

If the juvenile is detained by the Family Court for more than three days, a probable cause hearing must be held within six days of the initial appear-

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[20]This tendency is particularly evident when there is a risk of adverse publicity. As Judge Quinones testified:

> I think that judges are human beings just like anybody else and I believe that one of the factors that does influence some judges is the newspapers. Yes, I believe that that could be one of the considerations.

(J.A. 273). And Judge Driscoll stated:

> [If I had a psychological profile of the child before me at arraignment] it could present a problem, because if I didn't detain him and he then committed something else, I'd be in trouble. (T.682)

See also PX 13a, p.3.

ance. F.C.A. §§ 325.1(1),(2),(3). At the hearing, the prosecution must present evidence sufficient for the court to determine "whether it is reasonable to believe that a crime was committed; and ... that the respondent [juvenile] committed such crime." §§ 325.2,325.3[21] If continued detention has been ordered, the fact-finding hearing (trial) must be held within 17 days after the initial appearance if the juvenile has been charged with an A, B or C felony or within 6 days for other offenses, unless the accused requests a further delay. F.C.A. § 340.1.

Upon entry of an admission (guilty plea) or adjudication after trial, the case must be set down for a dispositional hearing, at which the juvenile's need

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[21]With certain exceptions, this evidence must be sworn and may not be hearsay. F.C.A. § 325.2 (2),(3).

for "supervision, treatment or confinement" must be ascertained. F.C.A. §§ 301.2(7), 352.1. Dispositional hearings differ from the detention determinations at issue in the present case in that at the dispositional phase,

> elaborate statutory provision is made for collecting diagnostic and other information, and specific criteria are established to guide the Family Court Judge.

(J.A. 102). Comprehensive probation investigations must be ordered for all felony cases and as a prerequisite to all placements; psychological and psychiatric diagnostic assessments are mandatory in certain felony and mental health placement cases and are discretionary in other cases. F.C.A. §§ 351.1(1),(2),(3).

In rendering its dispositional order, the Family Court "consider(s) the needs and best interests of the respondent as well as the need for protection

of the community" and must state its reasons for a particular disposition; except for the most serious felony cases, the court is obligated as well to order the "least restrictive available alternative" consistent with these interests. F.C.A. §§ 352.2(2),(3). (See also J.A. 106 n.25, 279-280).[22]

C. Detention Pursuant to Family Court Act § 320.5(3)(b).

1. Purposes and Effects of Detention

It is undisputed that the express legislative purpose of detention pursuant to F.C.A. § 320.5(3)(b) is to protect the community. (Brief for Appellant Schall at 23-25.) This was the unanimous finding of both courts. (J.A. 67-90, 104-05,114). Appellant's witness, Fami-

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[22]The court's dispositional options include conditional discharge, probation, placement with the Division for Youth or the Department of Social Services and, in serious felony cases, restrictive placement. F.C.A. §352.2(1).

ly Court Judge Cesar Quinones, aptly set forth the aims of detention:

> I believe that the purpose of 739(a)[(ii)] [now § 320.5(3)(b)] is really protection of the community. I believe that's the basic purpose for that provision.
>
> * * *
>
> If it serves the child's interests at all, it would be the minimal benefit that while he is in detention, he is not committing another crime, if that can be called a benefit to the youngster, but I don't believe that detention is actually for the benefit of the youngster, not under this statute.
>
> I certainly would not remand anybody for benefit. Perhaps you might find a rare case where somebody might be so favorably or so shockingly affected by a short stay in Juvenile Center that that might turn him around, but I don 't believe that is the purpose he is put there, no. You don't put them in for their own good, I'm sorry.

(J.A. 105 n.24, 270).

Quite the opposite of serving the interests of accused delinquents, Judge

Quinones noted the harmful effects of detention:

> In my opinion, all [detentions], juvenile or adult, can have bad effects. For one thing, we are talking about youngsters of tender age. You are taking them away from their family. I mean, that's bound to have a psychological[ly] ... detrimental effect on them.
>
> * * *
>
> Then again Juvenile Center, as much as we might try, is not the most pleasant place in the world. If you put them in detention, you are liable to be exposing these youngsters to all sorts of things. They are liable to be exposed to assault, they are liable to be exposed to sexual assaults. You are taking the risk of putting them together with a youngster that might be much worse than they possibly might be and it might have a bad effect in that respect.

(J.A. 105 n.24, 107 n.29, 270).

Appellant Schall, in her brief at 46-47, concedes the "deleterious effects that pretrial detention may have on a juvenile." Undisputed testimony by Mr. Hiltz, and Dr. Zinn clearly spelled out

the detrimental impact of detention both upon the juveniles and upon the ability of defense counsel to prepare defenses and obtain favorable dispositions. Additionally, serious actual and potential harms were cited by intervenor-appellant's experts, Michael Bigley and Ralph Kelly, both of whom were familiar with the realities of detention in New York State.

Mr. Hiltz testified that pretrial detention significantly impedes defense counsel in the preparation of an accused juvenile's case, thus rendering adjudication and placement more likely (J.A. 130-134). First, detention leads to a greatly quickened pace for trial, substantially shortening the defense attorney's preparation time. (J.A. 130). Second, trial judges may be prejudiced toward a child who comes from detention. The fact that they know that "there is

something in this person's background that led another judge to decide that he could not be released before trial," renders the trial more difficult. (J.A. 131,133).[23] Third, because Spofford Juvenile Center, New York City's detention center, is inconveniently located, it is relatively inaccessible to defense counsel, particularly court-appointed counsel, who have to visit in the evening in light of heavy case loads (Id.). Fourth, the identification of witnesses critical to the juveniles' cases, becomes problematic for clients in detention. (J.A. 131-32).[24] Finally,

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[23]Mr. Hiltz testified that detained juveniles are brought to family court in handcuffs (J.A. 130).

[24] Without the client's actual presence and assistance, defense investigators frequently are unable to find the witnesses needed to testify on the accused juvenile's behalf. (J.A. 131-32). Mr. Hiltz explained that often his clients do not know last names or addresses of potential witnesses (J.A. 132).

Mr. Hiltz stressed that a convicted juvenile placed in detention is prevented from participating in counseling programs, or from applying him or herself to available school programs, evidence of which favors a non-placement disposition. (J.A. 133-34).[25]

Dr. Zinn addressed the detrimental psychiatric consequences of detention for children. He broke down the potentially harmful effects of detention into two areas. First, the detention experience can significantly impede children's moral development and socialization, thus rendering future crime more

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[25] Children who are paroled pending trial are generally paroled after trial, as they are able to illustrate, by their good behavior in the community pending disposition, that they do not need to be sent away. (J.A. 134). Because judges also tend to continue a previous judge's remand decision, detained juveniles convicted at fact-finding are denied that opportunity to put forth a good record of behavior. (Id.).

likely.[26] Second, he outlined the consequences of the detention itself -- i.e., the real consequences of separation from family and from community and as an aspect of community, the school. (J.A. 232).[27]

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[26]Dr. Zinn testified (J.A. 231):

> For a young person who has not in fact committed the crime in question, * * * [i]n terms of the meaning of the experience, for the early adolescent, the police and, as the early adolescent gets older, the judiciary are the foundations of moral order in the society and in effect organizational social functioning. To be treated in a way that does not reflect their conduct, can leave them questioning the validity of that moral process.
>
> Once these vicious cycles, as kids go through the system, and problems develop and the more the problems develop the more distrust develops in the young person and the less cooperative they are and the less they come to believe that the police and the courts do in fact responsibly reflect moral order.

(J.A. 231).

[27]Dr. Zinn stressed how considerations unique to children can exacerbate these effects (J.A. 232):

> While a few days to a few weeks may not be so important to an adult, to a

Finally Dr. Zinn indicated that the "exposure to delinquent subcultures" inherent in the detention experience may also have harmful implications for juvenile detainees and may become a self-fulfilling prophecy for future court involvement (J.A. 233):

> The more a young person becomes involved with the court and with court placement, the more likely it will be that they will have subsequent court involvement. So one would add to the effects the possibility of directing the young person away from the mainstream of adolescent development and more in terms of a delinquent subgroup.

(footnote continued)

young person, that time is infinitely longer having lived for a relatively shorter period of time.

Of course, in many school programs, it is very difficult to make up work and get back on target. ... there is fairly strong evidence of a pattern with delinquent young people of falling behind in school, of suffering a blow to their self-esteem which makes it that much harder for them to function which pushes them that much more to the periphery of appropriate developmental activities and vicious cycles get set up accordingly.

Focusing on the detention experienced by appellee class members, intervenor-appellant's expert, Michael Bigley, testified that Spofford is a high security setting in which accused and convicted offenders are commingled with the pre-trial and post-trial delinquent population. There are strip searches, monitors at the entrances, solitary confinement, and bars on the windows. (J.A. 168-170). Mr. Bigley also testified that some youths are detained in county jails, with D.F.Y. approval as authorized by F.C.A. § 304.1 (2). (T. 290)[28]

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[28]In addition to his testimony, a D.F.Y. report Mr. Bigley helped to prepare, Juvenile Detention in New York, 1977, Policy and Practice, was placed in evidence (PX 36). This report states, inter alia:

> [T]he most subtle but perhaps the most harmful effect of secure detention is the creation of, and the impression left by, a high security atmosphere which is concerned about possible breaking out and physical attacks against staff.

Also addressing appellees' experience, Mr. Kelly described the detrimental consequences of being detained at a large institution such as Spofford (J.A. 295). He noted the problem of assaults by inmates upon staff and other inmates, the difficulties presented by the presence of sentenced inmates and the use of strip searches, room and group confinement.[29] (J.A. 295-297,303-304; T.566).

(footnote continued)

* * *

> [T]here is the potential of contamination of the less sophisticated by those more sophisticated in crime. Potential exposure to violence in detention facilities is present. Assaults, suicides and rapes in detention facilities have been documented by various authorities.

Id. at 20, 21; See also J.A. 167-68, 172.

[29]Group confinement involves the restriction of an entire dormitory of youths even for the acts of only a few. (J.A. 297-298).

2. Arbitrariness of Detention

The conclusion of the Court of Appeals that detention pursuant to New York's statutory scheme is imposed punitively derived in large measure from the "procedurally and substantively unlimited terms" of F.C.A. § 320.5(3)(b) and the results in practice of the unfettered discretion it accords. All alleged juvenile delinquents are eligible for detention, regardless of the offense charged and regardless of record, even if they have never before been arrested. In the absence of any limitation on the Family Court judges' discretion to detain or uniform criteria to guide their decisions, the panel ruled that

> the vast majority of the pretrial detentions involve either mistakes in judgment ... or the imposition of incarceration solely as punishment for unadjudicated crimes.

(J.A. 112).

As noted above, each judge follows his "own individual approach" in making detention decisions in the course of summary initial appearances. (J.A. 57). Political attitudes, fear of publicity, subjective personality factors, attitudes towards particular charges,[30] combined with generalized considerations about protection of the community, lead to a "process riddled with subjectivity and caprice", replete with numerous instances of unnecessary and arbitrary detention. (J.A. 70).

Examples of the results of such "unbridled discretion" (J.A. 70,122) can be seen in some of the district court's unanimously affirmed findings (J.A. 71):

> It is clear that the judge decides on pretrial detention for a variety of reasons -- as a means of protecting the communi-

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[30]Some judges, for instance, automatically remand all youngsters charged with weapons offenses. See, e.g., PX 1a, p.8; 6a, p.3; 42 p. 11.

> ty, as the policy of the judge to remand (Exhibit 6a, p. 3), as an express punitive device (Exhibit 42, p. 11), or because of the serious nature of the charge (Tr. 465, Exhibit 13a, p. 3), among others.

Further, the court found:

> Whether the juvenile was a first offender with no prior conduct, whether the court was advised that the juvenile was an obedient son or was needed at home, whether probation intake recommended parole, the case histories in this record disclose that it was not unusual for the court to discount these considerations and order remand based on a 5 to 15 minute evaluation.

(J.A. 83; see also J.A. 84-85).

Upon examining statistical evidence presented by both sides, as well as records of the 34 sample cases presented by appellees,[31] the courts below identified

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[31] These case histories concerned only youths detained preventively and were found by the district court to reveal "arbitrary and capricious action in its crudest and rawest form". (J. A. 83) [Emphasis supplied]. While the sample is concededly too small for precise statistical conclusions to be drawn, the case histories fully corroborated the statistical patterns evident

several classes of juveniles, constituting the overwhelming majority, for whom detention under the challenged provision was arbitrary and therefore unconstitutional.

First, because juveniles accused of all types of crimes are subject to detention, detention for nonviolent and trivial crimes predominated. The case histories included juveniles detained for "stealing a pair of shorts", for

(footnote continued)

in the aggregate data presented. The representativeness of these case histories was never challenged by appellants (J.A. 103, n. 19) and, in fact, undisputed testimony by Steven Hiltz established that the cases were quite typical. (J.A. 128). Although appellants continue to dispute the conclusions drawn both from the case histories and aggregate data, the Court of Appeals noted:

> Although the defendants have superior access to generalized statistics and at least an equal opportunity to present a counter-sample of case studies, they chose to rely solely upon the most vulnerable data in the record.

(J.A. 103, n. 18)

playing "three-card monte," a form of street gambling, and for "steal[ing] a quantity of subway-bus transfers".[32] Moreover, the Vera study introduced at trial indicates that 33% of those charged with B misdemeanors, 24% of those charged with A misdemeanors, and 41% of those charged with the lowest felony charge in New York -- E felonies -- are detained before trial (PX 44).

Second, because F.C.A. § 320.5(3)(b) has no specific requirements for prior delinquent histories, a sizeable number of first offenders were preventively detained. In appellees' case sample, for example, at least 23 of the 34 juveniles had no prior delinquency adjudications at the time of the deten-

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[32] See PX 8a,18b,21b.

tion hearing.[33]

Third, the district court identified the category of detainees (including 16 of the 34 case histories) against whom application of the preventive detention statute was deemed most "pernicious" - i.e., detainees who had been released by police upon arrest to their parents or guardians, and who had not been accused of any infractions during the "roughly five days to over a month" prior to their detention hearings. (J. A. 65).

Fourth, both courts below emphasized the overwhelming percentage of

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[33] See PX 1a,2a,4a,5a,6a,7a(2 juveniles),10a,11a, 12a (2 juveniles),13a,14a,15a,16a,19a,20a,23a,24a, 27a,28a,35a,43a. Of these, one (PX 2a) had an adverse fact-finding which was dismissed without an adjudication. Nine juveniles had absolutely no prior contacts with the Family Court. See PX 6a, 7a (2 juveniles), 10a, 11a, 12a, 13a, 14a, 19a. Additionally, insufficient information was available to assess the extent of delinquent histories in two cases. See PX 18a, 29a.

youths preventively detained but ultimately sent home as indicative of the arbitrariness of the detention scheme -- i.e., the lack of any connection to actual crime prevention purposes, even assuming, arguendo, that such purposes were deemed to justify the detention. As found by the Court of Appeals:

> [O]ne critical fact has been established--the vast majority of juveniles detained under [former F.C.A.] §739(a)(ii) either have their petitions dismissed before an adjudication of delinquency or are released after adjudication.

(J.A. 103).

The court relied upon a study prepared by the Vera Institute of Justice which established two patterns: (a) of detained juveniles, "49% have their cases dismissed before trial, 21% are dismissed or released after trial, and only 30% are restrictively placed;" and (b) the pretrial detention rate (one

third of all delinquency petitions) is far higher than the restrictive placement rate (11% of all petitions) (J.A. 102).[34]

Finally, adopting intervenor-appellant's analysis of the 32 cases in appellees' sample for which dispositions were known, the Court of Appeals noted that "well over two-thirds of the juveniles ... were released at or before the dispositional hearing" --specifically, 23 (or 70%) of the juveniles, of whom 12 had their cases dismissed, withdrawn or adjourned in contemplation of dismissal and 11 received probation or a suspended sentence. (J.A. 103).

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[34] See PX 44. The term "restrictive placement" is used as the term is commonly understood, not as it is more narrowly defined in F.C.A. §301.2(11). It should be noted that the record below also included data from the New York State Division for Youth to like effect. See SX 03, P3, Q3, R3.

On the basis of this evidence, the Court of Appeals concluded:

> The vast majority of the pretrial detentions involve either mistakes in judgment fostered by [former] § 739(a)(ii)'s procedurally and substantively unlimited terms or the imposition of incarceration solely as punishment for unadjudicated crimes.

(J.A. 112). The panel's conclusion that preventive detention remands are in actuality imposed as punishment derived from its findings that: (1) a large number of juveniles were detained despite evidence so "weak or insufficient" that they were ultimately never adjudicated; (2) many juveniles detained were mistakenly deemed to be dangerous in the "summary hearing" held under § 320.5(3)(b) but upon adjudication were released to the community; and (3) many juveniles detained were released upon disposition by the Family Court because the time served, including the preventive deten-

tion period, is frequently considered sufficient punishment. (J.A. 111-112). The court found no compelling interest to justify detention as to any of these groups and held as to the latter

> [D]etention serves the purpose of punishment rather than crime prevention, since early release - within days or at most a few weeks - by a Family Court Judge contradicts any asserted need for pretrial confinement to protect the community.

(J.A. 112)(footnote omitted).

The arbitrariness of the detention decisions made under New York's statutory scheme is evident not only by the results manifested but also by the overprediction which is inevitable from the process used in assessing whether juveniles before the Family Court present a serious risk of crime commission. The district court relied upon the finding of appellees' expert, criminologist

Leslie Wilkins[35] that:

> [H]e would be surprised if recommendations based on intake interviews were better than chance and assessed the judge's subjective prognosis about the probability of future crime as only 4% better than chance --virtually wholly unpredictable. He testified that no method had yet been devised which could predict with any acceptable degree of accuracy that a juvenile shall commit a crime, particularly the commission of an offense in a short space of time, as the judge must do in making his § 739 decision.

(J.A. 72).[36] Professor Wilkins observed that the shorter the period of risk --in this case, the interval of a few weeks during which the child would be paroled pending the next court date (J.A. 263) -- the more difficult and arbitrary the

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[35]Intervenor-appellant, in his brief at 20, misrepresented Professor Wilkins' testimony. He never expressed a moral objection to detention; he simply expressed a moral objection to "attempting to predict people who will be delinquent, ... who are not already delinquent." (J.A. 219)[emphasis supplied].

[36]Dr. Zinn testified to the same effect. (J.A. 234).

assessment of likelihood of crime, rendering it no better than randomly choosing from the population at large:

> [A]s [the base] rate drops, the likelihood, for example, of a person who has committed a violent crime, committing another violent crime in a given interval of time that probability really begins to get very, very small. So as you subdivide the groups or as you truncate time, so the percentage in the category you are looking for diminishes until you get to the proverbial needle in the haystack which not even statisticians can find.

(J.A. 194-195; see also J.A. 209.)[37]

For these reasons, as the district court concluded, appellees are deprived of pre-trial liberty based on "judgments that are untrustworthy and uninformed and without the requisite rationality which due process mandates." (J.A. 81).

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[37]In cases of first offenders, the probability of crime commission within such a short interval "would normally be extremely small indeed." (J.A. 208).

SUMMARY OF ARGUMENT

Appellees contend that a deprivation of liberty prior to adjudication of guilt pursuant to a predictive judgment of dangerousness to the community is per se unconstitutional. Punishment before trial is impermissible whether imposed on juveniles or adults. However, it is not necessary to reach this issue in this case. Whatever the constitutionality of a narrowly tailored, well-written preventive detention statute, the New York statute challenged in this case fails to meet minimal acceptability in three respects. New York's law is unconstitutional because: (1) it does not contain precisely drawn objective standards; (2) it is not limited to situations involving a very serious risk of harm to society; and (3) it does not provide procedural protections designed to assure the accuracy of the judgment

that the accused would commit a crime if released.

Incarceration involves a massive curtailment of liberty. Detention is even more damaging to juveniles than it is to adults. Only a social need of the highest order could justify detaining juveniles before an adjudication of guilt. The broad reach of New York's statute exceeds any conceivable governmental interest.

The unanimous finding of the courts below is that the vast majority of juveniles detained under the statute are detained unnecessarily without furthering any legitimate governmental interest. Whether one views the infirmity in the statute as yielding too high a rate of needless detention or as creating too high a risk of erroneous detention, the result is the same: the statute is constitutionally infirm.

Affirmance of the judgment below will aid the objectives of the juvenile justice system. There is far too much detention before trial administered by juvenile courts. The failure of the juvenile justice system to reduce recidivism is traceable to its policy of punishing before, rather than after, trial. Circumscribing the unfettered discretion to detain will improve juvenile justice while, at the same time, it will protect juveniles from unnecessary loss of liberty.

ARGUMENT

POINT I

NEW YORK'S JUVENILE PREVENTIVE DETENTION STATUTE IS UNCONSTITUTIONAL BECAUSE (A) IT FAILS TO ARTICULATE ASCERTAINABLE STANDARDS FOR APPLICATION; (B) IT IS FAR BROADER THAN NECESSARY; AND (C) IT FAILS TO PROVIDE PROCEDURAL PROTECTIONS DESIGNED TO ASSURE THE ACCURACY OF ITS PREDICTIVE JUDGMENTS.

Under any circumstances, preventive detention raises a host of troublesome constitutional questions. Appellees submit that a deprivation of liberty prior to an adjudication of guilt pursuant to a predictive judgment of dangerousness to the community is flatly inconsistent with our constitutional heritage. However, whatever the constitutionality of preventive detention *per se*, any attempt to impose such a system must, at a minimum, satisfy three preconditions of constitutional dimensions. First, it must contain precisely drawn objective standards governing its admin-

istration. In the absence of precise objective standards, any system of preventive detention risks degenerating into subjective arbitrariness. Cf. Colautti v. Franklin, 439 U.S. 379 (1979); Papachristou v. City of Jacksonville, 405 U.S. 156 (1972). Second, it must be limited to situations involving a very serious risk of harm to society. It is a truism to observe that something as drastic as preventive detention can never be justified except by the most serious social need. Addington v. Texas, 441 U.S. 418 (1979). Finally, it must provide a series of procedural protections designed to assure the accuracy of the necessarily inexact predictive judgment which lies at its core. Santosky v. Kramer, 455 U.S. 745 (1982).

New York's statutory scheme fails to satisfy any of the three constitutional pre-conditions. As the courts

below unanimously found, its lack of ascertainable objective criteria renders it a wholly subjective process; its broad reach exceeds any conceivable definition of serious social harm; and its lack of procedural safeguards virtually guarantees grossly inaccurate predictive judgments.

New York's statute must fall because of three pervasive defects: (a) the statute authorizes detention to protect the community from any crime, no matter how trivial; (b) the statute authorizes the detention of any juvenile, regardless of previous history; and (c) the statute lacks any procedural guarantees of accuracy.[38] These defects require affirmance without reaching the

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[38]Judge Newman found five defects in the statute. See p.12, supra. However, the five defects he identified are actually illustrations of the three pervasive defects noted in the text.

question of whether a more carefully drawn preventive detention statute could survive constitutional challenge. The broad reach of the statute exceeds any conceivable governmental interest, while the absence of limiting procedural protection impermissibly invites an unacceptable risk of erroneous and unnecessary deprivation of liberty.

In determining the constitutionality of a statutory scheme for effecting pre-trial detention, traditional due process analysis invites the Court to balance the private interests affected, the risk of erroneous deprivation of these interests through the procedures used, the probable value of alternative or additional procedures, and the governmental interest, including the function involved and the burden of alternative or additional procedures.

Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

A. The Juvenile's Interest In Pre-trial Liberty is Substantial

The interest of appellees' class in their liberty is of "transcending value." Speiser v. Randall, 357 U.S. 513, 525 (1958).

The decision to detain before trial is an important one in any criminal justice system. The time between arraignment and trial has been recognized to be

> perhaps the most critical period of the proceedings ... when consultation, thoroughgoing investigation and preparation ... [are] vitally important.

Powell v. Alabama, 287 U.S. 45, 57 (1932).

Moreover, wrongful detention of juveniles is even more damaging than wrongful detention of adults, as this record demonstrates. Incarceration has the potential to traumatize chil-

dren and to teach them the ways of crime. It can cause difficulties with school. It also increases the likelihood that the accused will be convicted. Finally, it increases the prospect that, once convicted, the juvenile will be sentenced to a restrictive type of placement. See pp.86-91, infra.

Perhaps best summarized by appellants' witness at trial, Commissioner Kelly, there are "detrimental consequences to institutionalization to most people and kids are no different." (T. 571). For these reasons, and aware that "[l]iberty from bodily restraint always has been recognized as the core of the liberty protected by the Due Process Clause from arbitrary governmental action," Greenholtz v. Inmates of the Nebraska Penal and Correctional

Complex, 442 U.S. 1, 18 (1979)(Powell, J., concurring in part and dissenting in part), the panel below correctly recognized that only a social need of the highest order could justify detaining juveniles before an adjudication of guilt.

B. The Prevention of Petty Crime Is Not a Sufficiently Compelling Social Need to Justify a Scheme of Preventive Detention.

The government's interest in preventing crime is, of course, substantial. However, this does not mean that the government's interest in preventing any crime is sufficient to justify a scheme of preventive detention. Assuming, arguendo, that pre-trial detention is ever permissible for the purpose of crime prevention,[39]

[39]At pages 94-106, infra, appellees contend that preventive detention impermissibly constitutes punishment before trial. Under this rationale,

F.C.A. § 320.5(3)(b) is overinclusive because it allows the incarceration of persons under sixteen based on a prediction that, if released, they would commit any act equivalent to a crime, including joy riding, drawing graffitti, or using an expired bus pass. As the record below demonstrates, many juveniles are detained preventively who have been accused of nothing more than a petty or trivial act. See pp. 38-39, supra.[40]

New York's scheme stands in sharp contrast to the preventive detention law

(footnote continued)
preventive detention is unconstitutional regardless of the substantiality of the government's interest, because the method chosen to further that interest is itself unlawful.

[40]Additionally, a critical problem with the statute's reach to include misdemeanors and other non-violent crimes is Justice Powell's observation in Baldasar v. Illinois, 446 U.S. 222, 231 (1980): "No court can predict with confidence whether a misdemeanor defendant is likely to become a recidivist."

challenged in United States v. Edwards, 430 A.2d 1321 (D.C.App. 1981), cert. denied sub nom. Edwards v. United States, 445 U.S. 1022 (1982), relied upon by appellants. That law authorizes detention only if the accused is charged with a limited number of "crime(s) of violence" or "dangerous crimes." D.C. Code 1973, §§ 23-1331(3),(4).[41]

Of the 33 juveniles in the sample introduced at trial for whom transcripts were available, at least 17 would have been automatically excluded from the reach of the District of Columbia law, either because of insufficiency of serious charges or lack of delinquent his-

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[41]These crimes are defined in the statute, inter alia, as "murder, forcible rape,... kidnapping, robbery, burglary, voluntary manslaughter ... arson, assault with intent to commit any offense, assault with a dangerous weapon,..." D.C. Code 1973, § 23-1331(3),(4).

tory.[42] Another 12 would probably have been excluded for lack of "clear and convincing" evidence of eligibilty[43]; only the remaining four seemed to have been eligible candidates for detention under Edwards.[44]

These findings comport with evidence presented at trial by appellant from the New York State Division for Youth.[45] Using the definitions contained in the District of Columbia Code for "crime of violence" and "dangerous crime", more than half -- 51% -- of all juveniles detained statewide in 1979 would have been automatically ineligible

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[42] See PX 1a,6a,11a,12a(2 juveniles),18a,19a, 21a,25a,43a.

[43] See PX 2a,3a,4a(2 juveniles),5a,8a,14a,23a, 24a,26a ,27a,28a.

[44] See PX 7a(2 juveniles),17a,20a.

[45] See SX O2,P2,Q2,R2.

for detention under the D.C. Code.[46]

Without deciding whether crime prevention may occasionally justify pretrial detention, it is clear that the state's interest in preventing petty offenses "is [not] great enough to justify such a massive curtailment of liberty." Humphrey v. Cady, 405 U.S. 504, 509 (1972).[47] See also Suzuki v. Yuen,

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[46]See Supplement to Brief for Petitioners-Appellees in the Court of Appeals (Table V). It must be noted that the data does not allow an analysis of prior adjudications or pattearn of past misbehavior which are additionally required under the D.C. Code to justify detention for certain crimes. Thus, of the 49% eligible for detention based on the charge alone, an unknown, but substantial, number would have been ineligible because of lack of requisite history. See D.C. Code §1322(b)(2)(A).

[47]The relatively short length of the detention cannot diminish the "massive curtailment" of liberty. Not only does the deprivation of liberty involve loss of freedom for the duration of the deprivation, but, as already shown, it infringes other fundamental rights as well, including preparation for trial and increases the likelihood of a restrictive placement. Moreover, even relatively short periods of detention may have seriously detrimental effects upon children, particularly in view of their differing senses of time. (See n.27, supra)

617 F.2d 173 (9th Cir. 1980). As Professor Tribe has observed, detaining a person before trial to prevent a "trivial property offense" is impermissible:

> No tenable concept of due process could condone a balance that gives so little weight to the accused's interest in pre-trial liberty.

Tribe, An Ounce of Detention: Preventive Detention in the World of John Mitchell, 56 U. of Va. L. Rev., 371, 381 (1970)[48]

Eliminating petty offenses from the reach of the statute would eliminate the

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[48] See also Note, The Cost of Preventive Detention, 79 Yale L.J. 926, 979 (1970):

> If the degree of danger [to society] is small, the interest of society in detaining the defendant would be outweighed by the cost and burden of detention .... For this reason, most commentators have agreed that preventive detention is permissible only where the crime anticipated is a serious felony or crime of violence.

See also Note, Preventive Detention Before Trial, 79 Harv. L. Rev. 1489, 1505 (1966).

vast majority of juveniles from eligibility. In such a scheme, as in the District of Columbia, the imposition of preventive detention would become the exception rather than the rule.[49]

Since the juvenile's interest in liberty clearly outweighs the state's interest in preventing trivial offenses, the statute is unconstitutionally over-inclusive.

C. The Lack of Procedural Safeguards Renders the Risk of Erroneous Deprivation of Liberty Too High

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[49]The District of Columbia law is marked by its extremely limited use. A study of the use of the law during its first year concluded: "The chief finding of the first ten months of observation has been the virtual non-use of the preventive detention law." Vera Institute of Justice, Preventive Detention in the District of Columbia 72-73 (1972). After five years, a House Committee observed: "From the date of enactment until [1975], pre-trial detention was rarely requested (only about 60 times during the entire 5 year period)." House Committee on the District of Columbia, H. R. Rep. No. 1419, 94th Cong., 2d Sess. 4 (1976). By sharp contrast, thousands of juveniles have been preventively detained in New York during this period.

a. Section 320.5(3)(b) Provides No Objective Criteria for Detention Decisions

The state's interest in crime prevention, even for serious crimes, is no greater than the juvenile's interest in liberty. It remains to be considered, therefore, whether under the current statute the risk of erroneous deprivation is too great and whether increased safeguards are necessary to avoid needless detention. As Judge Newman commented below: "To state the issue is to answer it." (J.A. 120). The challenged law is a textbook example of a statute without standards. The high rate of unnecessary detention is directly traceable to the standardless quality of the statute. Whether one views the infirmity in the challenged scheme as yielding too high a rate of needless detention, as did the majority

below, or as creating too high a risk of erroneous decision, as did Judge Newman, the result is the same: the statute is constitutionally infirm.

Although the state has a substantial interest in preventing serious crime, it has no interest in detaining juveniles who would not commit crimes if released. As Judge Newman observed in his concurring opinion, the governmental interest in crime prevention is

> of high value in a particular case only to the extent that the pretrial detention of a person will prevent the commission of a crime that he would have committed if not detained.

(J.A. 118-119).

New York's statute is devoid of procedural attributes designed to enhance its predictive accuracy. First, as Judge Quinones conceded, the statute provides Family Court judges with virtually unfettered discretion to invoke

preventive detention. The statutory requirement that a judge find a "serious risk" that a child will commit a crime provides no objective criteria to guide its implementation. The seriousness of the crime, the necessary degree of probability, the nature of the proof, and the relevance of parental care all are relegated to the subjective discretion of a Family Court judge. Not surprisingly, as Judge Quinones testified, the lack of uniform and objective criteria has resulted in a non-uniform and arbitrary application of the statute.

Under New York's scheme, preventive detention is based solely on a subjective guess about the future, rather than findings that the juvenile did something in the past (fled, committed a felony, etc.). As a result, "(a)ny child, regardless of his age, offense, or history of past behavior, may be considered

'dangerous' under present laws." California Youth Authority, Hidden Closets: A Study of Detention Practices in California 61 (1975).

All three members of the panel and the district court found that the procedurally and substantively unlimited terms of the statute provide unfettered discretion to a Family Court judge to order pre-trial detention. An insistence on objective limiting criteria can only enhance the state's interest in detaining only those juveniles for whom there is a substantial risk of serious crime commission.

The record conclusively demonstrates that there are no uniform standards for the decision to detain. The decision is based on the recommendation of a probation officer, after an interview which lasts from 10 to 40 minutes. The court appearance itself usually

lasts only five to fifteen minutes. See pp. 14-19, supra.

The Court of Appeals found that Family Court judges generally consider certain factors ostensibly related to crime prevention. (J.A. 104-105). Beyond these broad considerations, there are no specific uniform criteria considered by all Family Court judges in deciding whether or not to order detention. See pp. 20-21, supra. Such an undue degree of discretion in any statute impinging on constitutional values offends due process of law. See Colautti v. Franklin, supra; Papachristou v. City of Jacksonville, supra.

Judge Quinones indicated in his direct examination, for example, that the judges making the determination to parole or remand "all have our standards and we all have means of determining in

our own minds the seriousness of allegations." (J.A. 265). Indeed, the nature of the scheme begs for subjectivity. Mr. Benjamin, a probation officer for over thirty years, who has performed "thousands" of intake interviews (T. 186), indicated that the probation officer rests the decision to parole or remand on "whether the intake officer feels that the child may be a calculated risk if returned to the community." (J.A. 143). (Emphasis supplied). Moreover, this feeling is based, in part, on the "attitudes" of the parties (J.A. 144). As Judge Fuchsberg observed, in his concurring opinion in People ex rel. Wayburn v. Schupf, 39 N.Y.2d at 691, 385 N.Y.S.2d at 523, the challenged scheme simply "offers no indication whatsoever as to what criteria are to be used in determining when a child poses such a risk."

Appellants' principal response to this is that juveniles are adequately protected against arbitrary judicial detention because F.C.A. 320.5(3) requires the judge to state the facts and reasons for the detention order at the time it is made. (Appellant's Brief, p. 35, Intervenor-Appellant's Brief pp. 44-45). This is no answer.[50] Appellees do not claim that the evidence presented below showing the various bases for detention in New York reveals violations of the statute. Appellants ignore the fact that, in the very cases relied upon by the district court to strike the statute as arbitrary, Family Court judges complied fully with the statute

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[50]Appellants both rely on Kent v. United States, 383 U.S. 541 (1966) for this proposition. Kent is inapposite. It did not consider what are legitimate bases for decisions to transfer. In the procedural context in which that case reached the Court, it was enough to hold that the juvenile was denied a statutory opportunity to be heard.

and stated their findings and reasons for the detention.

Appellees' point is simply that, under the statute, any juvenile can be detained for any reason.[51] The total lack of uniform application demonstrated by the record and the conceded subjectivity of the decision-makers are inherent in the statute and render it constitutionally deficient.[52]

Finally, there is no possibility of effective appellate review because of the short span of pre-trial detention.

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[51]This section does not address the over-inclusiveness of the statute. It is plain that recitation of facts and reasons fails to cure the infirmity of detaining a juvenile to prevent a trivial or minor offense.

[52]An important study by the California Youth Authority, Hidden Closets: A Study of Detention Practices in California 63 (1975), recommends that detention to prevent future crimes "be limited to those charged with an offense which would be a felony if committed by an adult and [that] the circumstances surrounding the offense charged involve [ ] physical harm or substantial threat of physical harm to another."

(J.A. 70,n.29). As the Court of Appeals found, although individual writs of habeas corpus are theoretically possible:

> Individual litigation ... is a practical impossibility because the periods of detention are so short that the litigation is mooted before the merits are determined.

(J.A. 113).[53]

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[53]While recognizing that individual writs of habeas corpus are authorized, as in the Wayburn case, the district court found:

> The short span of pre-trial detention makes effective review impossible. Detention is over before appellate review can be obtained. In New York ex rel. Wayburn v. Schupf and in this case, motions to dismiss on grounds of mootness were denied because to hold otherwise would have meant insulating 739 from constitutional challenge. Nonetheless, in reality no juvenile ordered into pre-trial detention can test the validity of his adjudication while he is being held in custody pursuant thereto. (J.A. 70, n.29).

b. Inadequacies of Procedural Safeguards

Apart from the standardless quality of the statute, the absence of certain necessary procedural safeguards increases risk of error in determinations under section 320.5(3)(b). For example, there is no requirement that the state meet a prescribed standard of proof supporting the finding that, if released, the juvenile would commit a crime.[54]

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[54]Although this Court acknowledged the hazards of predicting future behavior, it has allowed such predictions to be made. Barefoot v. Estelle, ___ U.S. ___ (1983). There is, however, a significant difference between the prediction and its degree of error found tolerable in Barefoot and the facts in this case. It is one thing to permit a prediction of future behavior when there already are lawful grounds to deprive an individual of liberty. In such cases, any deprivation of liberty is based on past findings of fact, such as a conviction. It is quite another to permit a prediction of behavior which is itself the only basis for the deprivation of liberty. In this case, juveniles are detained, not because of what they have done in the past, whether previous convictions or the current crime which brought them before the court, but solely because a judge believes that they may commit a crime in the future. Barefoot provides no precedent for this drastic exercise of judicial power.

Indeed, the statute itself creates an intolerable degree of confusion as to the required degree of probability by utilizing different bases for detention in subsections (a) and (b) of section 320.5(3). When applying section (a), dealing with the risk of flight prior to trial, a judge must find a "substantial probability" of flight. However, in section (b), a judge must find only a "serious risk" of crime. This diminished degree of uncertainty cannot justify preventive detention. See, e.g., Santosky v. Kramer, supra; Addington v. Texas, supra. Similarly, there is no requirement that the judge ordering detention evaluate the degree of likelihood that the juvenile committed the crime of which he is accused. Neither probable cause nor a substantial proba-

bility of eventual conviction need be shown. Finally, there is no required showing that, upon conviction, there is a probability of eventual restrictive placement.[55]

The unnecessarily inclusive extension of New York's statute to petty crimes, coupled with the lack of objective criteria for its administration and the lack of rudimentary procedural safeguards designed to assure accuracy of application have resulted in a preventive detention scheme under which the vast majority of children detained under the statute are released after trial because they never should have been de-

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[55]The District of Columbia law relied upon by appellants requires, as a condition of eligibility for detention, clear and convincing proof of a past record of violent criminal behavior, and a finding of "substantial probability" of guilt in the present case. D.C. Code 1973 §§ 23-1322(a)(1,2), 1322(b).

tained in the first place. Given the conceded significance of the liberty interest at stake and the obvious state interest in assuring that preventive detention occurs only when necessary, the decision of the lower courts that New York's scheme cannot pass constitutional muster in its present, chaotic form is clearly correct.

POINT II

THE JUVENILE JUSTICE SYSTEM WILL BE IMPROVED BY AFFIRMANCE.

A. Too Many Juveniles Are Needlessly Detained

Amici propose that this Court reverse the judgment below in order to maximize the freedom of juvenile court judges to "help" children. For example, the Brief Amici Curiae on Behalf of Pennsylvania, etc. (hereinafter "Amici 23 States") argues (p.21):

> (b)y use of preventive detention in cases in which it is likely that the child will soon commit

> another crime, the juvenile justice system seeks to break the pattern, spare the child additional rehabilitation or punishment, and aid the child in maturing into a law-abiding citizen.

This reasoning would take this Court back to a jurisprudence which refused to review meaningfully constitutional challenges to juvenile delinquency statutes because of the high-minded purpose of the state and because children have fewer constitutional rights than adults. That jurisprudence is long past. As Chief Justice Burger said for a unanimous Court:

> We believe it is simply too late in the day to conclude...that a juvenile is not put in jeopardy at a proceeding whose object is to determine whether he has committed acts that violate a criminal law and whose potential consequences include both the stigma inherent in such a determination and the deprivation of liberty for many years.

Breed v. Jones, 421 U.S. 519, 529 (1975). Since In re Gault, 387 U.S. 1

(1967), the standard for "determining the applicability of constitutional rights [ ] in juvenile proceedings, requires that courts eschew the 'civil' label-of-convenience which has been attached to juvenile proceedings'...and that the 'juvenile process...be candidly appraised.'" Breed v. Jones, 421 U.S. at 529. (quoting In re Gault, 387 U.S. at 21 and 50.) It is a "candid appraisal" of the statute and its operation which requires affirmance of the judgment rendered below.

When this Court has been reluctant to apply clear constitutional principles to juvenile proceedings, it has been out of a concern that mechanical interference with the process "'might well destroy the traditional character of juvenile proceedings.'" McKeiver v. Pennsylvania, 403 U.S. 528, 540

(1971).[56]

With the exception of the denial of the right to trial by jury, "the Court's response...has been to make applicable in juvenile proceedings constitutional guarantees associated with traditional criminal prosecutions." Breed v. Jones, 421 U.S. at 528-29. This response has, in part, been due to a recognition "that there is a gap between the originally benign conception of the system and its realities." Id.

Affirmance will not interfere with the administration of the system, anymore than the imposition of a higher standard of proof did so in In re Winship, 397 U.S. 358 (1970). Affirmance will, of course, affect in a sub-

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[56]As Judge Gurfein observed: "A contrary decision in McKeiver might conceivably have sounded the death knell for juvenile courts as we know them." United States ex rel. Murray v. Owens, 341 F.Supp. 722, 726 (S.D.N.Y.), rev'd, 465 F.2d 289 (2d Cir. 1972), cert. denied 409 U.S. 1117 (1973).

stantive way the conditions under which juvenile court judges may detain juveniles upon arrest.

The unbridled discretion to detain juveniles upon arrest, even for first and trivial offenses, should be circumscribed. This case comes to this Court with unanimously affirmed findings of fact that the vast majority of juveniles detained pre-trial are released as their ultimate disposition.

Not only does the record clearly show that most juveniles detained in New York are not finally placed out of their homes, but New York's ratio of detention to ultimate disposition comports with the juvenile justice system nationally. Time and again observers of juvenile justice have commented on the inordinate use of pre-trial detention. As Professor Franklin Zimring recently wrote:

> The juvenile court's well documented use of detention after arrest

> as a substitute for formal adjudication represents a troublesome social control device that is not visible when only the post-trial sanctions are examined. This is important because nationwide detention is about seven times as frequent as post-adjudication commitment to secure facilities. It is difficult to view detention practices as part of a sentimental general theory of youth protection.

Zimring, Kids, Groups and Crime: Some Implications of a Well-Known Secret, 72 Journ. of Crim. Law and Criminology 867, 882 (1981) (footnotes omitted). In 1978, a particularly important report noted:

> On any given day, about 11,000 minors are held in secure detention, that is to say, under lock and key. ...Each year, about 400,000 minors are detained before trial, eight times as many as are sent to secure facilities after a dispositional hearing.

Confronting Youth Crime: A Report of the Twentieth Century Task Force on Sentencing Policy Toward Youth Offenders,

50-51 (1978). (footnote omitted.)[57]

Not only are the vast majority of detained youths released from custody after the pre-trial phase, but, for the country generally, "(t)he one punitive disposition available for informally processed offenders is temporary detention." Confronting Youth Crime, 52 (footnote omitted.) A noted sociologist has observed that:

> the modern American strategy for correcting juveniles tends to rely on an emergent policy. The unstated policy is: offer more juvenile detention jailing than any other correctional response.

Lerman, Discussion of 'Differential Selection of Juveniles for Detention,' Journal of Research in Crime and Delin-

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[57]See also, National Council on Crime and Delinquency, Correction in the United States, 13 Crime and Delinquency 1, 11, 15, 36 (1967); Ferster, Snethen, and Courtless, Juvenile Detention: Protection, Prevention, or Punishment?, 38 Fordham L.Rev. 161 (1969).

quency 166, 168 (July 1977)(emphasis in original).

In response to this practice, the National Council on Crime and Delinquency has declared:

> Juvenile detention is frequently misused as an immediate punishment for delinquent acts. If punishment is the Court's only disposition, it ought to be administered only after the facts are in -- not as an immediate reaction to the charge.

National Council on Crime and Delinquency, Correction in the United States, 13 Crime and Delinquency 11 (1967).

It is this quality of juvenile justice which has led observers to note the "Alice in Wonderland" dimension of juvenile justice.[58] As Judge Quinones

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[58]In Lewis Carroll's Through the Looking Glass, the queen observes that the king's messenger is "in prison now, being punished; and the trial doesn't even begin till next Wednesday; and of course the crime comes last of all." Perplexed, Alice asks, "Suppose he never commits the crime?" "That would be all the better, wouldn't it?" replied the queen. L. Carroll, Through the Looking Glass 88 (Harper & Brothers ed. 1902).

explained New York's system at the trial below: pre-trial detention serves the "protection of the community" (J.A. 269; T. 509), whereas "the main purpose of the dispositional hearing...would be the best interest of the child." (J.A. 279).[59] In the words of the Juvenile Justice Standards Project, "(t)he result, paradoxically, is considerably less detention under better conditions once the juvenile justice system ceases to presume that the

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[59]This difference between the purposes of pre-trial detention and the purposes of final sentence lends itself to unnecesary detention for still another reason. As the district court noted, "there is a substantial problem of over-prediction... [of] persons potentially dangerous who, if subsequently released, would engage in no further violent or even criminal behavior. (J.A. 73) The "conservative" decision is to detain. This tendency to over detain was described by Professor Wilkins as being "risk aversive" (J.A. 203) See pp. 21-22, supra. See also, Bazelon, Institutionalization, Reinstitutionalization and the Adversary Process, 75 Colum.L.Rev. 897, 900 (1975); Ennis & Litwack, Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom, 62 Calif.L.Rev. 693, 711-19 (1974).

child is innocent." American Bar Association/Institute of Judicial Administration, Juvenile Justice Standards Project, Standards Relating to Interim Status 2 (1980).

This policy is not only unconstitutional, it is unwise. This case presents the Court with an opportunity to protect juveniles from needless loss of liberty while eliminating an abusive practice which has contributed directly to the failures of juvenile justice noted often by this Court. As in Breed, affirmance "will aid the objectives of th[e] system." 421 U.S. at 540.

In Gault, this Court focused particularly on the singular inability of juvenile courts to control recidivism. 387 U.S. at 21-22. The practices challenged in this case contribute mightily to those failures. As the California Supreme Court stated:

> Locking up children charged with or suspected of offenses, before adjudication, probably does more to contribute to the army of habitual criminals than any other procedure in what is called the juvenile justice system.

In re William M., 3 Cal.3d 16, 31, n.25; 89 Cal.Rptr. 33, 43, n.25(1970). Juvenile courts are far more likely to improve their record by eliminating the power to detain at will upon arrest.[60]

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[60]"Many judges sincerely believe that detention has therapeutic value and that confinement serves as a deterrent to further delinquency.... On the contrary we conclude that there is no value in detention as a deterrent to delinquency. The child who will be deterred by a stay in detention is the same child who is affected positively by his court appearances before the judge. In other words, the impact of the court as as institution representing the law will have the effect sought by detention if the child is amenable to treatment and supervision in his own home."
Whitlatch, Practical Aspects of Reducing Detention Home Population, 24 Juv. Justice 17, 22 (1973).

1. There Are No Benefits to Juveniles Which Justify Unnecessary Detention

This Court has frequently recognized the significant interests juveniles possess to remain free from unlawful or wrongful deprivations of liberty. See In re Gault, 387 U.S. at 27, 29, 36-37, 50; In re Winship, 397 U.S. at 365-66; Breed v. Jones, 421 U.S. at 529. Once detained, detainees are subject to many indignities incident to detention. Bell v. Wolfish, 441 U.S. 520 (1979).

The record in this case conclusively demonstrates that there are no special benefits to juveniles in detention in New York to justify an otherwise unconstitutional process. Cf. McKeiver v. Pennsylvania, supra. To the contrary, incarceration can be a devastating personal experience, involving a traumatic removal from one's family,

school and community. (J.A. 232). See pp. 30-32, supra.

The record clearly shows that pre-trial detention can be seriously harmful to juveniles:

> Juveniles detained under [former F.C.A. §] 739(a)(ii) may be held in a secure facility and exposed to assault and criminal subcultures.

(J.A. 107).[Footnote omitted].

Moreover, wrongful incarceration is likely to contribute to future delinquent or criminal conduct:

> Official action may actually help to perpetuate delinquency in the child through a process in which the individual begins to think of himself as delinquent and organizes this behavior accordingly. The process is further reinforced by the effect of the labeling upon the child's family, neighbors, teachers, and peers, whose reactions communicate to the chld in subtle ways a kind of expectation of delinquent conduct. The undesirable consequences of official treatment are maximized in programs that rely on institutionalizing the child.

The President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Challenges of Crime in a Free Society 80 (1967).[61]

The potentially traumatic impact of incarceration is all the more real given the conditions of confinement to which juveniles are subjected in New York. As the former New York City Deputy Mayor for Criminal Justice, Herbert Sturz, put it in 1976: "Spofford is in many ways indistinguishable from a prison." (PX 30, p.6). The restrictive conditions in secure detention have already been set forth at pp. 33-34, supra.

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[61] See also In re William M., 3 Cal. 3d at 31 n.25, 89 Cal.Rptr. at 43, n.25 (1970): "The experience tells the youngster that he is "no good" and that society has rejected him. So he responds to society's expectation, sees himself as a delinquent, and acts like one."

2. Detention Adversely Affects the Court Proceedings

Detention prevents the juvenile from locating witnesses who are only known to him (J.A. 131-133). With the accused in detention, counsel must do all the trial preparation, investigation, and witness preparation himself. See Miller, Preventive Detention - A Guide to the Eradication of Individual Rights, 16 Howard L.J. 1, 15 (1970).[62]

Additionally, pre-trial detention may have an adverse effect on the fact-finding process itself. The trial judge is the sole finder of fact and is always aware that a juvenile has been in deten-

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[62] See also, Bitter v. United States, 389 U.S. 15, 16 (1976); Barker v. Wingo, 407 U.S. 514, 533 (1972); Stack v. Boyle, 342 U.S. 1, 8 (1951); Kinney v. Lenon, 425 F.2d 209, 210 (9th Cir. 1970); Ares, Rankin & Sturz, The Manhattan Bail Project: An Interim Report on the Use of Pre-Trial Parole, 38 N.Y.U.L. Rev. 67, 84-86 (1963); Rankin, The Effect of Pretrial Detention; 39 N.Y.U.L. Rev. 641 (1964).

tion. Accordingly, the chances are good that the judge will be prejudiced by knowing that something in the child's background led another judge to order the detention (J.A. 131). See also, Preventive Detention: An Empirical Analysis, 6 Harv.Civ.Rts./Civ.Lib.L.Rev. 289, 347 (1971).

Finally, the disposition of the case may be influenced by detention because sentences are based on the juvenile's amenability to treatment or supervision in the community. In New York, for example, no sentence may be imposed without judicial inquiry into the particular background of the individual. F.C.A. § 352.2(2); In re Nicholas W., 45 A.D.2d 850, 358 N.Y.S.2d 493 (2d Dept. 1974). Confinement before trial prevents the juvenile from demonstrating a capacity to remain in his home setting

(J.A. 133-134). As one commentator put it:

> It is unquestionably true that the child with an apparently stable living arrangement, a job or school enrollment, and other indices of respectability will do wonders in altering the judge's perspective as to proper disposition.

(SX F, p.80, n.40).[63]

For all of these reasons, "the danger of too much detention before trial or disposition currently outweighs the danger -- both for juveniles and society -- of too much release." Standards Relating to Interim Status at 3.

B. Even Without § 320.5(3)(b) New York Has Ample Power to Protect the Public From Criminally Prone Juveniles

Amici 23 States have suggested (Brief, p.1) that "the elimination of

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[63]The record in this case strongly supports these contentions. As the Vera Institute study shows, in all of the cases which resulted in a placement outside of the juvenile's home, 86.4% involved juveniles who were detained pre-trial. (PX 44, p.2).

preventive detention would put the juvenile justice system in grave risk of extinction by seriously eroding public support for its separate existence." This argument is totally unsupported and unsupportable. It is also an inappropriate argument to make to this Court, since it completely mis-applies the reasoning in McKeiver v. Pennsylvania, 403 U.S. at 540, that certain kinds of procedural safeguards may be withheld from the juvenile justice system because including them would "interfere" too greatly with its operation and "might well destroy the traditional character" of the system. This Court has never embraced a jurisprudence which blinks at constitutional defects because the public insists upon keeping them.

Moreover, the argument is hyperbolical in its own terms. The public simply is not threatened by an affir-

mance in this case. New York retains an enormous capability to detain juveniles upon arrest. New York may detain, without bail,[64] all juveniles who are found by the court to be likely not to return. Appellees do not challenge this power in any way. This power is much greater than the state possesses for adults accused of crime. When courts conclude that adults are at risk not to return, bail may be imposed, provided it is not excessive. New York Criminal Procedure Law § 510.30; 18 U.S.C. § 3146. For juveniles, the power to detain is unfettered once such a finding is made.

Preventive detention is not what nourishes the system and it is certainly

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[64]The power to detain juveniles in New York without bail is not challenged in this case. All parties agree that such detention is wholly beyond the issues raised in this case.

not what justifies its separate existence. In fact, New York embarked on a course away from juvenile court for those under 16 years old in 1978, three years before the district court opinion in this case. By enacting the Juvenile Offender Law and subjecting 13, 14 and 15 year olds to criminal court jurisdiction in specified cases, New York ironically has exempted these more serious offenders from the reach of preventive detention. At the very least, this proves that preventive detention is not a necessary feature of New York's juvenile justice system, without which the public safety would be jeopardized.

POINT III

THE STATUTORY SCHEME IMPOSES PUNISHMENT BEFORE TRIAL IN VIOLATION OF THE CONSTITUTION.

Although ruling that pre-trial confinement to assure an accused's presence

at trial is a valid non-punitive purpose, Bell v. Wolfish, 441 U.S. at 538-41, this Court recognized that the purpose for confinement is critical in determining the constitutionality of any deprivation of liberty.

In this case, it is undisputed that the express legislative purpose of F.C.A. § 320.5(3)(b) is "crime prevention" (Brief for Appellant Schall, pp.23-25; J.A. 67,104-105,114). This is an important, limiting feature of this case which distinguishes it from most other juvenile detention statutes.[65]

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[65]A careful examination of the statutes, as described in Appendix A of the Brief Amicus Curiae submitted on behalf of 23 states reveals that all but three states expressly authorize detention to protect the child in addition to protecting the community. Only Florida, Louisiana and Michigan, like New York, authorize detention solely to protect the community. As Judge Newman noted, this case does not address whether protection of the child constitutes a legitimate alternative purpose to punishment in those statutes which permit it. (J.A. 120).

An important constitutional question, which need not be decided in this case, (See Point I, supra, at 50-54) is whether this asserted community protection purpose is permissible as a basis for detention. The Court of Appeals expressly did not reach this issue. (J.A. 111).[66] The broader question was unnecessary to the panel's decision because, the court concluded that, in actuality, the statute "is utilized principally, not for preventive purposes, but to impose punishment for unadjudicated criminal acts."[67] (J.A. 111). (See also Judge

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[66]Because the Court of Appeals did not reach this issue, vacation and remand, rather than reversal, may be more appropriate if the Court disagrees with the holding being reviewed.

[67]This precise holding would apply even if, consistent with many other states, section 320.5(3)(b) had been enacted to protect juveniles.

Newman's concurring opinion at J.A. 117, n.1).

The panel's conclusion that §320.5(3)(b) remands are in actuality imposed as punishment derived from its findings that: (1) a large number of juveniles were detained who were ultimately never adjudicated delinquent; (2) many juveniles detained were mistakenly deemed to be dangerous but upon adjudication were released to the community; and (3) many juveniles detained were released upon disposition because "the time served, including the preventive detention period, is frequently considered sufficient punishment." (J.A. 111-112). The court found no compelling interest to justify detention as to any of these groups. Even in the absence of these findings, this statute would be unconstitutional.

A. Punishment Before Trial Is Constitutionally Proscribed

Punishment before trial is antithetical to American constitutional law. It is a truism that in the United States every criminal justice system includes a "trial which the United States Constitution guarantees to any accused before he may be punished." Baker v. McCollan, 443 U.S. 137, 144 n.3 (1979). Whether punishment inflicted by the state occurs in the criminal context or in any other context:

> [T]he state does not acquire the power to punish...until after it has acquired a formal adjudication of guilt in accordance with due process of law.

Ingraham v. Wright, 430 U.S. 651, 671-72 n.40 (1977).[68]

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[68]See also Bell v. Wolfish, 441 U.S. at 535; Gregory v. Chicago, 394 U.S. 111, 112 (1969) Thompson v. City of Louisville, 362 U.S. 199 (1960); Speiser v. Randall, 357 U.S. at 525-36.

Under our constitution all persons (juveniles as well as adults) are cloaked with a presumption of innocence. Enforcement of that presumption "lies at the foundation of the administration of our criminal law." In re Winship, 397 U.S. at 363.[69] As this Court has previously recognized, among the reasons an accused enjoys a right to freedom before conviction is that it "prevent(s) the infliction of punishment prior to conviction." Stack v. Boyle,

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[69]Although this Court has ruled that the presumption of innocence "has no application to a determination of the rights of a pre-trial detainee during confinement before his trial has even begun," Bell v. Wolfish, 441 U.S. at 533 (emphasis supplied), this conclusion has no relevance to the issues in this case. Wolfish was limited solely to what conditions government may impose on detainees once they are properly detained. Moreover, "[t]he only justification for pre-trial detention, asserted by the Government is to ensure the detainees' presence at trial." 441 U.S. at 534, n.15. Accordingly Wolfish provided "no occasion to consider whether any other governmental objectives may constitutionally justify pre-trial detention." Id.

342 U.S.1, 4 (1951).[70] See also Bell v. Wolfish, 441 U.S. at 582 (Stevens & Brennan, J.J., dissenting):

> [P]rior to conviction every individual is entitled to the benefit of a presumption both that he is innocent of prior criminal conduct and that he has no present intention to commit any offense in the immediate future.

As recently stated by the Court of Appeals for the Eighth Circuit:

> No one can deny society's continuing concern for preventing the occurrence of such offenses and exercising every legitimate effort to punish those who commit the crime. But punishment for any crime before trial and proper conviction is alien to our legal system and constitutes a denial of due process.

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[70] A clue to the Framers' understanding that the loss of pre-trial liberty is punitive may be found in the fact that the prohibition against excessive bail language and the prohibition against cruel and unusual punishment are contained in the same sentence in the Eighth Amendment: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted."

Hunt v. Roth, 648 F.2d 1148, 1162-63 (8th Cir. 1981); vacated and remanded as moot sub nom. Murphy v. Hunt, 455 U.S. 478 (1982) (per curiam).

To determine if a particular government act constitutes punishment, this Court has instructed that one must inquire into, inter alia:

> whether its operation will promote the traditional aims of punishment -retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable to it.

Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168 (1963).[71]

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[71]H.L.A. Hart characterized legal punishment in the following terms:

> (i) It must involve pain or other consequences normally considered unpleasant.
> (ii) It must be for an offense against legal rules.
> (iii) It must be of an actual or supposed offender for his offense.
> (iv) It must be intentionally administered by human beings other than the offender.

Under this test, the challenged scheme must be regarded as constituting punishment in the constitutional sense. This Court has recognized that punishment in modern society serves several purposes:

> It would be archaic to limit the definition of 'retribution.' Punishment serves several purposes; retributive, rehabilitative, deterrent - and preventative. One of the reasons society imprisons those convicted of crime is to keep them from inflicting future harm, but that does not make imprisonment any the less punishment.

United States v. Brown, 381 U.S. 437, 458 (1965). See also McGinnis v. Royster, 410 U.S. 263, 273 (1973).

(footnote continued)

> (v) It must be imposed and administered by an authority constituted by a legal system against which the offense is committed.

H. Hart, "Prolegomenon to the Principles of Punishment," in Punishment and Responsibility 4-5 (1968).

The district court correctly observed that:

> (t)he state cannot escape the obviously punitive nature of detention under [former F.C.A.] § 739 by labeling the statute preventive and 'regulatory,' since 'even a clear legislative classification of a statute as 'non-penal' would not alter the fundamental nature of a plainly penal statute.

(J.A. 90-91). The actions of the state in detaining juveniles before trial "is criminal punishment even though it is designed not so much as retribution as it is to keep individuals from inflicting future harm." Specht v. Patterson, 386 U.S. 605, 609 (1967). See also Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 477 n.40 (1977).

Detention for the protection of society, based on a prediction that, if released, the accused would commit a crime, is a classic form of prevention and deterrence, and a valid form of punishment after trial. H. Packer, The

Limits of the Criminal Sanction, (1968). In fact, deterrence may only be utilized punitively. "Retribution and deterrence are not legitimate nonpunitive government objectives." Bell v. Wolfish, 441 U.S. at 539 n.20.

There is a constitutionally significant difference between detention before trial in order to ensure one's presence in the future and detention because of a judicial finding that one is dangerous to society. Finding that an individual is more likely than not to commit a crime if not jailed stigmatizes the individual. (J.A. 88). See Breed v. Jones, 421 U.S. at 529. Detention to prevent crime is inextricably connected with a final goal of any criminal justice system. By contrast, detention to assure completion of the trial process serves no sentencing value; it simply furthers society's independent

interest that the trial process take place with the accused's presence.[72]

Punishment based upon the unproven assumption that someone has done something wrong in the past offends the essentials of due process. As the district court noted:

> If incarceration under the statute were based exclusively on a founded suspicion that the juvenile had committed crimes, no one would doubt that this constituted punishment.
>
> To hold that it is not "punishment" when based on a vague suspicion that the juvenile may commit future crimes would render the applicability of the due process clause in inverse proportion to the arbitrariness of governmental decision-making.

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[72]Detaining an accused in order to assure the integrity of the fact-finding process is a deprivation of liberty to which all citizens are subject. Thus, witnesses are frequently held in "protective custody" or otherwise detained pending a trial, when deemed necessary by the government. See Tribe, An Ounce of Detention: Preventive Justice in the World of John Mitchell, 56 U. Va. L. Rev. 371, 404 (1970).

(J.A. 91)[73]

Preventive detention is imposed for a prior offense in the sense that arrest for a crime is a pre-condition to the imposition of the detention. Such detention is not merely "regulatory" and forward looking; upon acquittal the juvenile must be released from detention. See Guggenheim, Paternalism, Prevention and Punishment: Pretrial Detention of Juveniles, 52 N.Y.U.L. Rev. 1064, 1091 (1977). Neither the unaccused individual nor the person acquitted of the crime may be detained because he poses a risk to society. Similarly, the Constitution does not allow a license to detain preventively the presumptively innocent arrestee.

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[73] See also Note, Toward a Constitutional Definition of Punishment, 80 Colum.L.Rev. 1667,1681(1980).

CONCLUSION

FOR THE FOREGOING REASONS, THE JUDGMENT BELOW SHOULD BE AFFIRMED.

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